

UNITED STATES COURT OF APPEALS
For the
THIRD CIRCUIT

Case No. 15-1883

National Labor Relation Board,

Petitioner,

v.

Regency Heritage Nursing and Rehabilitation Center,

Respondent.

Petition for Rehearing

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INTRODUCTION

This memorandum seeks rehearing, pursuant to FRAP 35, of the panel's decision in this matter issued August 16, 2016.

REQUIRED STATEMENT

Pursuant to Local Rule 35.1, counsel for Regency states, that he expresses a belief, based on a reasoned and studied professional judgment, that this appeal, insofar as rehearing is sought, involves a question of exceptional importance *i.e.* whether an “abuse of discretion” standard should apply to recusal decisions made by members of the NLRB about their own recusals.

ARGUMENT FOR REHEARING

After this matter was fully briefed and actually submitted on April 6, 2016, this court, on *June 6, 2016*, decided *1621 Rte. 22 W. Operating Co., LLC v NLRB*, 825 F3d 128 (3rd Cir. 2016) (The “*1621 decision*”) That decision, *inter alia*, established the “precedent” cited to by the Court in this case. Essentially, it established, in this circuit, that a deferential abuse of discretion standard for decisions by NLRB members concerning motions for their recusal would apply. The *1621 decision* court noted that,

"We review an agency member's decision not to recuse himself from a proceeding under a deferential, abuse of discretion [144] standard." *Metro. Council of NAACP Branches v. FCC*, 46 F.3d 1154, 1164, 310 U.S. App. D.C. 237 (D.C. Cir. 1995); see also *Mayberry v. Maroney*, 558 F.2d 1159, 1162 (3d Cir. 1977) (applying the same standard to recusal of district judges). That standard is premised on the principle that "deferential review is used when the matter under review was decided by someone who is thought to have a better vantage point than we on the Court of Appeals to assess the matter."

1621 Rte. 22 W. Operating Co., LLC v NLRB, 825 F3d 128, 143-144 [3d Cir 2016].

It is respectfully submitted that the standards applicable to the recusal of federal judges is singularly inapt for application to NLRB board members.

Federal judges are, of course, appointed for life. As such, if a period of time passes from their earlier source of income and clients, there is less need for scrutiny of their decisions on recusal. In the case of NLRB members, by contrast, the maximum term after Senate confirmation is merely four years. In the case of Member Hirzoawa ("Hirozawa"), he was sworn in August 5, 2013 for a term that would end August 27, 2016, a little over *three* years.

Moreover, one needn't be politically astute to surmise that Hirozawa knew that he was unlikely to be confirmed by the (Republican) Senate for another full four year term, particularly since President Obama had never even sent in a nomination for Senate confirmation for a "Republican" Board Member, Harry

Johnson, whose term expired a year earlier on August 27, 2015. (It is noted that Mr. Johnson's "term" was for a little over *two* years.¹)

As such Hirozawa, as opposed to a federal judge, had every incentive to please his long standing clients, and every incentive not to antagonize them, as it is entirely likely that he will have to represent them in the very near future. He will likely tout these decisions to bolster his stature as a prospective lawyer, who "did the right thing", for these very clients.² At the very least, his decisions are not to be reviewed under the high "abuse of discretion" standard and are owed no particular deference.

There is particularly no reason, moreover, to assume that in this case this Court has any less a "better vantage point" than Hirozawa does about his recusal. The entire (exceedingly meager) record on the issue is before the Court. This is far from a federal judge hearing a case at trial, where this Court described the appellate and district court "conversation";

As one leading commentator has put it, "[i]n the dialogue

¹ Mr. Johnson promptly joined the "management" side labor law part of Morgan Lewis and the firm touts his being on the NLRB in his profile.

² "We do not let judges make decisions which fix the extent of their fees, see *Tumey v. Ohio*, 273 U.S. 510, 71 L. Ed. 749, 47 S. Ct. 437 (1927)." *Ottley v Sheepshead Nursing Home*, 688 F2d 883, 898 [2d Cir 1982]. We should certainly not let NLRB members bolster their gravitas by giving them deference in deciding issues of their recusal and then letting them make favorable rulings for their (soon to be) clients.

between the appellate judges and the trial judge, the former often would seem to be saying: 'You were there. We do not think we would have done what you did, but we were not present and we may be unaware of significant matters, *for the record does not adequately convey to us all that went on at the trial*. Therefore, we defer to you.'"

United States v Tomko, 562 F3d 558, 565 [3d Cir 2009]. [*emphasis supplied*]

Hirozawa was not conducting a trial and as one engaged in merely appellate review has no better vantage point on his recusal obligations than does this Court. There is, therefore, no rationale for deference to Hirozawa's decisions, as the "vantage point" of this Court and that of Hirozawa are the same.

The panel's opinion states only that Hirozawa did not directly participate in the handling of *this* case. It does not deny, though, that Hirozawa actively represented the charging party union , and this local, while a partner at the law firm that is representing the same client, and this local, *in this case*. Hirozawa has never stated that he did not represent this client in matters involving this very respondent. He has never asserted that he was unaware of cases being handled by his partners against this same respondent on behalf of this same client *while he was a partner in the office*.

Hirozawa's term at the Board expired in August 2016. Hirozawa has not stated *to date* that he is not returning to his old law firm now that his term

ended. The firm's "home" page, however, touts his membership on the NLRB after being its partner for 19 years. Indeed, he could be back at his old, nine member, firm while this case is still *sub judice* before this court .

The panel slavishly cites to hyper technical compliance with various rules and executive orders to justify its deference to Hirozawa's participation in this case. It also engages in impermissible *post hoc* rationalizations in seemingly asserting that Hirozawa "held" that he was not compromised enough to even have to "run it up the flagpole", as the rules appear to require.³ This is particularly problematic if an abuse of discretion standard is applied to the "decision" of an NLRB member to not even run such questions "up the flagpole". When protected by such a high bar, why would *anyone* do that?

It is respectfully submitted, however, that the applicable test is how an objective "reasonable" person with knowledge of the facts would view the appearance of impropriety or bias in Hirozawa's participation in a case that *his* law

³ "...where the employee determines that the circumstances would cause a reasonable person with knowledge of the relevant facts to question his impartiality in the matter, the employee *should not participate in the matter* unless he has informed the agency designee of the appearance problem and *received authorization from the agency designee* in accordance with paragraph (d) of this section.

(5 CFR § 2635.502§ 2635.502(a) (Lexis Advance through the September 12, 2016 issue of the Federal Register)) [*emphasis supplied*]

firm is representing one of the parties in *this* very case before *him* at the NLRB.

Moreover, it is likely that the rules and executive orders cited, with one or two year limitations, did not contemplate that, as the “Rip Van Winkle” of administrative agencies, a case could be “out there” for five or six years. Thus, a case that was started when Hirozawa was still at the firm, could still be pending before the NLRB five years later. (“Today’s decision confirms the NLRB has become the Rip Van Winkle of administrative agencies” *Register-Guard* 351 NLRB at 1121 quoting *NLRB v Thill* 980 F2d 1137-1142 (7th Cir., 1992)

In this case, not only did Hirozawa’s office represent the Local (which was sufficient for Chairman Pearce to recuse himself, since he represented the same local as a client at his office in *upstate New York*), Hirozawa’s office represented *this* New Jersey local *in this very case from its inception to this date*.⁴ Hirozawa’s “decisions” to 1) not even run this issue up the flagpole and 2) to not recuse himself, run directly counter to Chairman Peirce’s decision in this case to recuse himself. There was much less reason for Chairman Peirce to recuse himself than was the case for Hirozawa. As noted, Chairman Peirce’s law firm represented

⁴ In the *1621* case Chairman Pierce was permitted to hear the matter because his chief counsel Dichner (Hirozawa’s partner) was shielded from his consideration of the case and *he* was not Dichner’s partner and the case was not being handled by his law firm. There is no assertion that there was any shield applied to Hirozawa in this, or the earlier cases, handled on behalf of this client against this respondent in his law firm.

this client in upstate New York. Hirozawa's represented this client, in this New Jersey office, in this case against this respondent. This Court, in light of these vastly different outcomes, should not apply an abuse of discretion standard nor defer to Hirozawa's decision. He does not, after all, assert that he had no knowledge of the case, only that he did not participate in its actual litigation. (*See* the brief in chief in this matter) This Court pointed this distinction out as a redeeming fact regarding Member Becker:

The Board also noted that Member Becker "played no role in and has no knowledge of" the 2003 proceeding, and that, although he did serve as counsel to the SEIU in the past, he *never* served as its "general counsel." (A-1.) [*emphasis supplied*]

[\(*NLRB v Regency Grande Nursing & Rehab. Ctr.*, 453 F App'x 193, 197 \[3d Cir 2011\].\)](#) It seems that had Member Becker merely been "general counsel", without more, his recusal would be mandated notwithstanding his lack of knowledge of the proceeding.

This case is therefore dramatically different. Hirozawa's law office directly litigated this very case from its inception, Hirozawa represented this very client for decades and was a partner in the office when this same "respondent" had *multiple* cases and charges filed by *that* client and litigated by his law firm against *this* same respondent. His refusal to recuse himself is so suspect and owed no

deference simply in contrasting his decision to Chairman Pierce's decision to recuse himself. Even applying the abuse of discretion standard, the two holdings refute each other and themselves establish an abuse of discretion. Chairman Pierce recused himself although his office represented the same client but in a *different* law firm, and he was not a partner in the law firm handling the case, and was unconnected to the actual case before the Board. Hirozawa, by contrast refused to recuse himself notwithstanding that *he and his* office had long represented *this* client, and did so in *this* office in other cases involving this same respondent, and in *this* very case. These starkly different decisions on recusal in this case would normally put arbitrariness of the decisions in issue. "However, where the Board has reached different conclusions in prior cases, it is essential that the "reasons for the decisions in and distinctions among these cases" be set forth to dispel any appearance of arbitrariness."(*Mem. Hosp. of Roxborough v NLRB*, 545 F2d 351, 357 [3d Cir 1976].) In this case, the recusal of Hirozawa is much more compelling than that of Chairman Pierce. The Court should, therefore, determine these NLRB legal decisions *in plenary review* and not use an abuse of discretion standard and not give any deference to them. "We exercise plenary review over questions of law *and the Board's application of legal precepts*, *Tubari, Ltd. v. NLRB*, 959 F.2d 451, 453 (3d Cir. 1992)" (*Passavant Ret. & Health Ctr. v NLRB*, 149 F3d 243, 246 [3d Cir 1998].) "Our review of questions of law is plenary. *Tubari, Ltd. v. NLRB*,

959 F.2d 451, 453 (3d Cir. 1992).” (*NLRB v Greensburg Coca-Cola Bottling Co.*, 40 F3d 669, 673 [3d Cir 1994].) [*emphasis supplied*]

As is evident, applying an “abuse of discretion” standard in these sort of cases of recusal and deference, regarding short term NLRB members, is too high a standard to apply as the circumstances are dramatically different from recusal applicable to life tenured federal judges. This standard is prone to great, and certainly perceived, mischief and has *every* appearance of impropriety to a “reasonable” person. All that is missing in Hirozawa deciding this case, against his (9 man) office’s nemesis, is a “wink” to his clients.

The Court should rehear this matter and, as with other questions of law, apply *de novo* plenary review to the questions of law involved. The Court should require detailed rationale on recusal motion decisions so that it can properly review the decision on plenary review.

CONCLUSION

Based on the forgoing, the Court should rehear this matter, upon rehearing it should apply a standard of plenary review of recusal decisions made by NLRB members, and, in this case, when applying plenary review, it should find that Member Hirozawa should have recused himself from hearing this case and the order should be denied enforcement and the matter remanded to the NLRB to be

heard by a valid panel.

Dated: New York, New York
September 19, 2016

Respectfully submitted,

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